IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924.

D. B. ROBERTSON, *Appellant,* **vs. RAILROAD LABOR BOARD,** *Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF AND ARGUMENT FOR APPELLEE.

PART I.

Motion to Quash Service of Summons.

The argument of counsel (pages 4 to 68, inclusive,) seems to resolve itself into the two following contentions:

1. The district court was without jurisdiction because "any court" (Transportation Act, 1920, sec. 310 [b]) does not mean any court, but means "any court of competent jurisdiction," as defined in section 51 of the Judicial Code (36 Stat. L. 1101);
2. The marshal for the Northern District of Ohio was without authority to serve the respondent below with a subpoena because the statute fails to authorize, in terms, such an act.

The purpose of convenience will be served by considering the second point first.

A. The service of the subpoena by the marshal.

The duties, and powers, of marshals are found in sec. 787 R. S. which reads as follows:

> "It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

In performing their duties, marshals are "mere ministerial officers, to execute process when put into their hands." (*The Levy Court of Washington County* v. *Ringgold,* 5 Pet. 451, 454.)

Counsel does not dispute the fact that the subpoena (Rec. 7) was actually put in the hands of the marshal for service, nor does counsel dispute the fact that service was had upon the respondent within the territorial limits of the Northern District of Ohio.

The statute (sec. 787, R. S., *supra*) is broad enough to empower a marshal to serve, within his district, a lawful order issued from a court of the United States sitting without his district. In other words, if the thing, subpoena or order, which he receives has been lawfully issued, then he has power to serve it.

This seems so clear that further argument will becloud, not clarify.

The sole remaining question, then, is—Was the subpoena, issued by the district court in Illinois and directed to the marshal in Ohio, a "lawful precept * * issued under the authority of the United States?"

This question, it seems, must be answered in the affirmative if "any court" means "any court," but must be answered in the negative if "any court" means "any court

of competent jurisdiction, i. e., any court of the district within which the respondent resides."

B. The subpoena was lawfully issued.

The question here is not, as counsel admits (p. 17), whether congress can constitutionally authorize the process of one district court to run into another district. The court from which the subpoena issued was a legislative, not a constitutional, court and there can be no doubt as to the power of congress to authorize the court in Illinois to summon the respondent from Ohio to answer.

The narrow question here is,—Has congress so provided?

To assist the court in ascertaining the meaning of the words "any court," counsel has selected (p. 19) from the many rules and maxims in aid of interpretation, one which expresses the thought that subsequent statutes, touching the subject-matter of a general code, should "be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose." This rule of interpretation has been raised by counsel to the dignity of an inflexible rule of substantive law.

Another rule of interpretation may also be considered, the rule which was applied by the district court (Rec. 14-5), that is, "that the natural and usual significance of plain terms is to be adopted as the legislative meaning in the absence of a clear showing that something else was meant." (See, *U. S.* v. *First National Bank*, 234 U. S. 245, 258; *Dewey* v. *U. S.*, 175 U. S. 510, 521; *Lake County* v. *Rollins*, 130 U. S. 662, 669, 670.)

Statutes prescribing limits of jurisdiction may be divided, roughly, into two classes:

1. Those concerning disputes between private citizens, equals.

2. Those concerning disputes between sovereign and subject, unequals.

The general statute (sec. 51 of the Judicial Code) concerns itself only with the first class and does not even purport to be legislation designed to include the second. So soon as attention is directed to the second class, suits to which the government is a party, it becomes obvious that an additional element, not present in the first class, must be considered, to-wit, the convenience of the government. This is illustrated in the present litigation.

The Railroad Labor Board summoned 102 witnesses, including the respondent, to appear before it to give evidence, but all of them appeared specially by present counsel for the appellant and refused to testify, assigning reasons. (Rec. 4.) These witnesses, as counsel says (p. 44), lived in practically all states west of the Mississippi, a not unusual situation in view of the territorial extent of modern carrier systems. The convenience of the government, in the economy of time and money, is clearly better served by that interpretation of the statute which will permit the bringing of suits to compel the giving of testimony, exactly the same in their nature, in one jurisdiction, rather than in many and scattered jurisdictions.

Assuming that congress really meant "any court" when it said "any court," how, we might inquire of counsel, could it have more appropriately expressed that idea? What other words could it have used to convey that meaning?

"Any" ordinarily means all, without restriction. (*Chicot County* v. *Lewis*, 103 U. S. 164, 167; *Heyler* v. *City of Watertown*, 16 S. D. 25, 91 N. W. 334; *New York County Medical Ass'n* v. *City of New York*, 32 Misc. Rep. 116, 65 N. Y. S. 531, 532; *Middlebrook* v. *State*, 43 Conn. 257, 267; *Chartiers and Robinson Turnpike Co.* v. *McNamara*,

72 Pa. 278, 281; *Hopkins* v. *Sanders,* 172 Mich. 227, 137 N. W. 709, 713.)

In *Chase* v. *Whiting,* 30 Wis. 544, the statute under consideration provided for the reception in evidence of, and giving the effect of *prima facie* proof to, certain deeds executed "by any sheriff, deputy sheriff, referee or other person in pursuance and by virtue of any judgment, order or decree of any court of record of this state" (Wisconsin).

In rejecting the contention that these general words should be qualified, the court, speaking through Mr. Chief Justice Dixon, said (p. 546, 547):

> "The phrase 'or other person in pursuance and by virtue of any judgment, order or decree of any court of record in this state,' is of very general import and not to be restrained except by the clear context and proper subject matter of the act, or by express words found in it or in some other statute *in pari materia.* * * But it is or must be conceded that the county court acting as a court of probate, is a court of record, and when the statute says 'any judgment, order or decree of any court of record of this state,' it is impossible upon the words themselves or upon the context and whole subject matter of the act, to give it a judicial construction which will exclude the judgments, orders and decrees of the county court. There is no sound and legitimate rule of interpretation which would authorize or sanction such a construction."

In the instant case, a reference to statutes *in pari materia,* that is, statutes concerning administrative bodies, strengthens our contention that "any court" means "any court," this for the reason that whenever congress intended to restrict the administrative body to a resort to a particular court, *including a court having jurisdiction under sec.* 51 *of the Judicial Code,* it in terms expressed the restriction.

Thus, the Interstate Commerce Act of Feb. 4, 1887, as amended, grants jurisdiction to the court "within the jurisdiction of which such inquiry (by the commission) is car-

ried on." To the same effect is sec. 9 of the Federal Trade Commission Act of Sept. 26, 1914. (Ch. 311, 38 Stat. L. 717.)

In the Act of March 4, 1923, amending the act creating the United States Coal Commission, however, congress, in terms, restricted the commission to resort to the court which would have had jurisdiction under sec. 51 of the Judicial Code, by providing, in sec. 3, that "the commission may invoke the aid of the district court of the United States for the district in which such person (the witness) resides." The same provision is found in the Corporation Tax Act of Aug. 5, 1904. (36 Stat. L. 112.)

The fact that congress, in statutes *in pari materia,* expressed itself whenever jurisdiction was to be restricted to a particular court, coupled with the appropriateness of the words used, "any court," to convey the meaning apparently intended, shows, we submit, conclusively, that congress did not mean, by "any court," the district court for the district within which the witness (respondent) resides, but did mean exactly what it said,—any United States district court.

Part II.

The Motion to Dismiss the Petition.

The points raised by counsel (pages 69 to 142, inclusive,) divide themselves into

1. A jurisdictional point which has been certified to this court (Rec. 22), to-wit:—This is not a case or controversy.
2. Non-jurisdictional points which have not been certified to this court, to-wit:—The district court *should not* have granted the prayer of the petition because
   a. The respondent's right of privacy would thereby be violated;

b. An administrative tribunal which is not engaged in settling legal rights or wrongs should not be permitted to compel testimony; and

c. The district court, in aiding the petitioner, would be participating in the formulation of a public policy.

Appellant's record is not in shape to permit the raising of the non-jurisdictional points, which, although they may involve the constitutionality of a statute, must be presented by an appeal taken after the filing of assignments of error, which was not done in this case.

When jurisdictional and non-jurisdictional points are made in a case by the defendant, and the district court decides all points in favor of the plaintiff, the defendant may elect to carry the whole case to the appropriate circuit court of appeals or he may have the question of jurisdiction certified to this court (*U. S.* v. *Jahn,* 155 U. S. 109, 115; *Wilson* v. *Republic Iron & Steel Co.,* 257 U. S. 92, 96), in which latter event, the statute provides (sec. 238, Judicial Code; 36 Stat. L. 1157 as amended, 38 Stat. L. 804):

> "The question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

A jurisdictional question is one of the *power* of the court, as a federal court, to entertain the action. (*Male* v. *Atchison, T. & S. F. R. Co.,* 240 U. S. 97, 99.)

Appellant, in its non-jurisdictional points, complains merely that the district court *should not* have denied the motion to dismiss (Rec. 20) because of certain supposed rules of general law which govern merely the *duty* of the court, not its *power.* (*Burnet* v. *Desmornes y Alvarez,* 226 U. S. 145, 147.)

Of course, a failure of the district court to decide correctly as to its duty results in a judgment which is er-

roneous, not void, and which may be attacked for error because of the alleged failure of the court to follow general rules of law or procedure applicable to all courts of this country and not to federal courts in particular. (*Mexican Central R. Co.* v. *Eckman,* 187 U. S. 429, 432; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, 233; *Fore River Shipbuilding Co.* v. *Hagg,* 219 U. S. 175, 178; *Bogart* v. *Southern Pac. Co.* 228 U. S. 137, 144.)

We shall, therefore, refrain from discussing, on an incomplete record, non-jurisdictional questions going to the merits of the controversy. These are all raised, on petition and answer, in the companion case which the record shows exists. (Rec. 9.)

The sole remaining point, then, is whether or not the present cause is a case or controversy within the meaning of the constitution.

The case of *Interstate Commerce Commission* v. *Brimson,* 153 U. S. 447, disposes so completely of appellant's contention that we take the liberty of quoting at length, rather than attempting a restatement of the reasoning of the court.

In the *Brimson* case, the district court declined to order the respondent (witness) to testify, and the commission appealed. In reversing and remanding, this court, speaking through Mr. Justice Harlan, said, at page 476:

> "Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an Act of Congress and seek to obstruct its enforcement. And those issues made in the form prescribed by the Act of Congress,

are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an Act of Congress declaring it to be an offense against the United States for any one to refuse to testify before the Commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it. And the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency and is unable to provide some method, judicial in form, and *direct in its operation*, for the prompt and conclusive determination of this dispute."

Counsel's argument (pp. 118 to 134), although skilfully bedecked with the jewels of logic, in its unblushing nakedness is merely this:—

1. Congress, by statute, has authorized the Railroad Labor Board to invoke the aid of the district court, which it has done.
2. Congress, by statute, has empowered the district court to grant relief, that is, to order the witness (respondent) to appear to testify.
3. But: The statute is unconstitutional because of the said non-jurisdictional points.
4. Therefore: The attempt to proceed under an unconstitutional statute must fail because the attempt is not a case or controversy.

To attempt to demonstrate that the contrary is true would evince a lack of confidence in the self-evident things of the world.

CONCLUSION.

We submit that the act of the marshal, in serving the subpoena upon the respondent, was a lawful act, the subpoena being a lawful precept directed to him and issued under the authority of the United States, that is, issued from a district court to which congress had, by statute, granted jurisdiction over the respondent in the present litigation, which is a case or controversy within the meaning of the constitution.

Respectfully submitted,

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